NO. 82-173

Office - Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1982

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

HOH INDIAN TRIBE;
QUINAULT INDIAN NATION;
QUILEUTE INDIAN TRIBE;

MALCOLM BALDRIGE, SECRETARY OF COMMERCE;
AND
STATE OF WASHINGTON,

RESPONDENTS

RESPONSE TO PETITION FOR CERTIORARI

Carl V. Ullman
Counsel for Respondents
Quinault Indian Nation
Office of Reservation Attorney
P. O. Box 189
Taholah, Washington 98587
(206) 276-8211

Susan Kay Hvalsoe
Counsel for Respondents
Hoh and Quileute Tribes
Cullen, Holm & Foster
Heritage Federal Building
5th & Columbia
Olympia, Washington 98504
(206) 943-6747

QUESTIONS PRESENTED

1. Whether this petitioner can, through intervention below, relitigate matters that it litigated under a different name in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), and whether it is bound by that case.

2. Whether the petitioner Association is entitled to be an intervenor under Rule 24(a) of the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

PARTIES 1

STATEMENT OF THE CASE 2

ARGUMENT 3

1. The Association's issues are res judicata and binding on the Association. 3

2. The petition for intervention was not timely perfected. 5

3. The case has no precedential value. 6

4. The Petitioner is attempting to portray unjust results below, when in fact there are none. 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Puget Sound Gillnetters' Ass'n v. United States District Court, Supreme Court No. 78-139 4

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 4,5

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) i,1-4

OPINION BELOW

The Ninth Circuit issued an unpublished memorandum opinion which, under Ninth Circuit Rule 21(c), has no precedentialvalue outside this particular case.

PARTIES

The petitioner represents certain salmon fishing interests. It is the very same Association that was before the Court under a different name in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, No. 77-938, 443 U.S. 658 (1979)("Fishing Vessel Ass'n" herein). There is no dispute as to this identity, and the Petitioner admits that it uses the names interchangeably. At page 4 of its brief in Fishing Vessel Ass'n the Association said:

> The opening brief of the petitioner State of Washington contains certain facts applicable to the respondent Washington

State Commercial Passenger Fishing Vessel Association ("Charterboat Association") in No. 77-983. The Charterboat Association adopts the State of Washington's Statement of the Case insofar as applicable.

The respondents are three federally recognized Indian tribes with fishing rights secured under a treaty with the United States; the Secretary of Commerce who regulates the ocean fisheries; and the State of Washington.

STATEMENT OF THE CASE

The Tribes sued the Secretary to enforce their treaty fishing rights as set forth in the 1979 ruling of this Court in Fishing Vessel Ass'n. This Court had ruled that the treaty secures to the Tribes a share of each salmon run, from each river, returning to the Tribes' traditional fishing areas, and that the treaties "clearly place a responsibility on the United States, rather than the State, to police the

take of fish in the relevant waters" subject to the United States' jurisdiction. Id. at 688.

The Petitioner untimely sought to intervene to expand the scope of the case to relitigate the underlying salmon sharing standard. This was an issue already litigated in Fishing Vessel Ass'n, a case which the very same Association had brought and which bears Petitioner's other name. Intervention was denied and the Association appealed. The Ninth Circuit affirmed the denial, observing in a one paragraph opinion that the case was simply a "thinly veiled effort by the Association to relitigate issues that have previously been decided."

ARGUMENT

1. The Association's issues are res judicata binding on the Association.

The petitioner is the very same entity that litigated the underlying

river-by-river, run-by-run standard in Fishing Vessel Ass'n. The Association is bound by the result there.

Furthermore, it is bound under the principle of parens patriae by the State's participation and representation of such fishery "user group" associations. A similarly situated fishing group argued unsuccessfully against the principle in Fishing Vessel Ass'n.[1/] The Court rejected that argument saying that such individuals and associations enjoyed "common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment." Fishing Vessel Ass'n, at 692, citing Tacoma

---

[1/] Puget Sound Gillnetters' Ass'n Supreme Court brief at p. 73. Puget Sound Gillnetter's Ass'n v. United States District Court, No. 78-139 was one of the cases consolidated with Fishing Vessel Ass'n.

v. Taxpayers of Tacoma, 357 U.S. 320, 340-341 (1958).

2. The petition for intervention was not timely perfected.

Rule 24(c) clearly requires that a motion for intervention be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." The Association did not submit its proposed Answer until after the district court had ruled on the motion. The motion itself is not a pleading within the rule because it does not commit the intervenor to particular claims or defenses so that the existing parties can respond.

The Petition for Certiorari does not discuss this shortcoming, choosing instead to focus on the fact that the motion alone was promptly filed. (Petition, p. 30.) But full compliance with Rule 24 is required. The utility of the Rule is illustrated by

the present case where the motion itself promised to broaden the case and inject into it a matter already decided by the Court. The Association sought to intervene without filing an Answer that would commit it by announcing what theories it would advance or what remedy it would seek. The district court and the parties were left in the dark in these relevant matters, and the court was correct in denying the motion.

There is no need to review this case to test petitioner's compliance with the requirements of Rule 24.

3. The case has no precedential value.

This case was disposed of by the Ninth Circuit in an unpublished memorandum opinion. Under Ninth Circuit Rule 21 (c) the opinion has no precedential value outside this case, and no potential for causing a conflict among the circuits.

4. The Petitioner is attempting to portray unjust results below, when in fact there are none.

The Petitioner's portrayal of the results of the litigation below is so exaggerated that it may warrant exposure by a brief example here. Despite Petitioner's claims that its fishing opportunity will be greatly reduced by the treaty sharing standard, no such reduction has occurred. In 1981 after the decision below, the Association's catch of coho salmon exceeded by some 18,000 fish the allocation that had been set for it by the Secretary before the Tribes brought their case. Other statistics and analyses advanced by the Association are vigorously disputed by the Tribes and contradict those which the Secretary uses for fishery management.

We realize that this forum is not the place for deciding such factual

disputes. It is enough for present purposes to point out that the Association's numbers are exaggerated and that there is no injustice here that commands review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Carl V. Ullman

Susan Kay Hvalsoe
Counsel for Respondent Tribes